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Supreme Court U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

1980 Term

No. _____

CLAUDE DEWAYNE FULTZ - - - Appellant

versus

COMMONWEALTH OF KENTUCKY - - Appellee

MOTION TO DISMISS APPELLANT'S APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

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IN THE

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No. _____

CLAUDE DEWAYNE FULTZ - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OF APPELLEE

Comes now the appellee, Commonwealth of Kentucky, and in response to the Jurisdictional Statement of the appellant, Claude Dewayne Fultz, moves this honorable Court to dismiss this present appeal to this Court from the judgment of the Court of Appeals of Kentucky pursuant to Rule 16.1(b) of the Rules of the United States Supreme Court as the appeal does not present a substantial federal question.

OPINION BELOW

Substantially the same issue as is presently before this Court was presented by the appellant in his direct appeal of his judgment of conviction to the Court of

Appeals of Kentucky, whose opinion affirmed the appellant's conviction. A copy of said opinion is included in the appellant's Appendix.

JURISDICTION

The appellant has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether a Mandatory Statutory Provision Prohibiting Probation, Shock Probation, or Conditional Discharge for One Convicted of the Commission of a Felony With the Use of a Firearm Constitutes Cruel and Unusual Punishment Within the Meaning of the Eighth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant's appeal herein was filed pursuant to 28 U.S.C. § 1257(2) and he claims relief under the Eighth and Fourteenth Amendments to the United States Constitution. The appellant has challenged the constitutionality of Kentucky Revised Statute (KRS) 533.060.

STATEMENT OF THE CASE

The appellant, Claude Dewayne Fultz, was indicted by the Jefferson County Grand Jury on November 29, 1977, for the offense of first-degree robbery; the indictment further charged that the appellant committed

said offense "by threatening the use of physical force upon Wilbert Allmond, while armed with a pistol" on October 2, 1977. (Transcript of Record, hereinafter T.R., p. 62.) While the appellant initially entered a plea of not guilty, he subsequently withdrew that plea and entered a plea of guilty to the offense of second-degree robbery. (T.R., p. 62.) The appellant was indicted along with two other individuals for the robbery.

The trial court held, and the Commonwealth so argued, that the two co-indictees were *not* the armed party in the commission of the offense. (T.R., pp. 52, 64, 74.) As such, the trial court did not apply the requirements of KRS 553.060(1) to these individuals.

In the Commonwealth's recommendation on the appellant's plea of guilty, the Commonwealth stated that the appellant, and two others in a car, robbed the "Majik Mart" store at gunpoint. On October 16, 1978, the trial court held a hearing on appellant's plea of guilty. (T.R., pp. 65-69.) The trial court thoroughly questioned the appellant as to whether he understood the nature of his guilty plea, and his right to a jury trial. (T.R., pp. 65-66.) The trial court specifically asked the appellant:

> Q. The indictment says that on the 2nd day of October, 1977 that you along with William Otis Robinson and Patrick Sullivan robbed one Wilbert Allmond (sic) while armed with a pistol at the Majik Food Mart; is that what you did, sir?
>
> A. Yes, sir. (T.R., p. 69.)

On November 17, 1978, Judge Benjamin Shobe entered an order denying probation with the notation, "Probation is prohibited by law." (T.R., p. 79.)

REASON FOR DISMISSING THE APPEAL

The Appellant Has Failed to Present a Substantial Federal Question.

In this appeal, the appellant, Claude Dewayne Fultz, has raised the contention that KRS 533.060(1) is unconstitutional as it violates the Eighth Amendment's prohibition against cruel and unusual punishment. This statute provides that when, as is the fact in the present case, a person is found guilty or pleads guilty of a Class A, B, or C felony committed with the use of a firearm, that person shall be denied probation, shock probation, or conditional discharge as a matter of law. Appellant has set out the text of this statute in full at pages 3 and 4 of his Jurisdictional Statement.

In support of his contention, the appellant argues that he was an excellent candidate for probation as he is generally a good fellow. The appellee submits to this Court that such an argument hardly raises a substantial federal question for review by this Court. The record on direct appeal to the Court of Appeals of Kentucky clearly supported the imposition of the nonprobationary restrictions of KRS 553.060(1). In the Commonwealth's recommendation to the appellant's guilty plea, the Commonwealth asserted that the appellant alone was armed during the robbery. (T.R., p. 63.) The appellant did not contradict this assertion

by any objection. During the hearing, the trial court specifically asked the appellant whether the indictment was true in that he robbed the Majik Mart while armed with a pistol. In response, the appellant answered, "Yes, sir." (T.R., p. 69.) Neither the appellant nor his counsel voiced any objection to this admission; no attempt was made to tell the trial court that the appellant was not the armed party. As such, this Court should totally disregard the argument made by the appellant as it fails to address the jurisdictional requirements of raising a substantial federal question.

The appellant further argues that the Eighth Amendment's prohibition against cruel and unusual punishment requires a sentencing court to evaluate not only the crime, but also the criminal. In support of this argument, the appellant contends that he is "a peaceful and well mannered young man" and that the record on appeal shows that in committing armed robbery he was without any intention to harm anyone and even had a passive role. As authority, the appellant cites *Woodson* v. *North Carolina,* 428 U. S. 280 (1976), and *Gregg* v. *Georgia,* 428 U. S. 153 (1976). These cases merely discuss, in general terms, the proposition that the Eighth Amendment requires punishment to fit both the crime and the criminal.

The appellee submits that in the present case, the requirements as set out in *Woodson, supra,* and *Gregg, supra,* were fully met. The nature of the crime was the commission of a class felony with a firearm; the record, including the testimony of the appellant, before the trial court at the time of sentencing, was

that the appellant was possessed of the requisite criminal intent, including the intent to use the force of arms, in the commission of robbery. The legislature of Kentucky, in enacting KRS 533.060(1), has determined that persons using firearms and thereby threatening death or serious physical injury to the public are deserving of greater punishment. As such, the record before this Court reveals that the punishment in this case not only fits the crime, but it also fits the criminal.

The appellee wishes to point out to this Court that while the appellant has cited vague generalities concerning the Eighth Amendment, he has failed to cite to this Court *any* authority in direct support of his contention. Undoubtedly, this is because appellant's present contention has been rejected before. The validity of such non-probationary sentencing statutes has been recognized by not only the high court of Kentucky, but also by this Court. In *Moore* v. *Cowan,* 560 F. 2d 1298 (6th Cir. 1977), the Sixth Circuit Court of Appeals dealt with a challenge to KRS 435.090 which provided a mandatory life sentence without parole for the offense of rape. There, the Court held that such a statutory sentencing provision did not constitute cruel and unusual punishment.

In *Schick* v. *Reed,* 419 U. S. 256 (1974), this Court upheld such non-probationary/no parole sentencing against attack based upon the Eighth Amendment. Specifically, this Court stated at page 267:

> The no-parole condition attached to the commutation of his death sentence is similar to sanctions

> imposed by legislatures such as mandatory minimum sentences on statutes otherwise precluding parole; it does not offend the Constitution.

In Kentucky, such mandatory, non-probation sentencing has been upheld. It has been held that a sentence of life imprisonment without parole is not invalid as cruel and unusual punishment. *Edwards* v. *Commonwealth,* Ky., 500 S. W. 2d 396 (1976); *Martin* v. *Commonwealth,* Ky., 493 S. W. 2d 714 (1973).

The statute in question was specifically approved by the Supreme Court of Kentucky in *Parrish* v. *Commonwealth,* Ky., 581 S. W. 2d 560 (1979), in which the Kentucky high court stated at page 563:

> We are of the opinion that the mandatory provisions of KRS 533.060 do not inflict cruel and unusual punishment, nor do these provisions deny Parrish equal protection of the law.
>
> . . .
>
> We are of the further opinion that the General Assembly by imposing the restriction of no probation for an offense involving a firearm, as here, makes a reasonable classification of weapons used in the commission of crimes . . . the General Assembly has expressed a public policy in the terms of KRS 533.060 which does not violate either the Constitution of the United States or the Constitution of Kentucky.

The appellee submits that the statute in question is constitutional as it does not constitute cruel and unusual punishment.

In addition, as this and other courts have rejected the contention of the appellant herein, the appellee submits that the appellant has failed to raise a substantial question of federal law.

CONCLUSION

The appellee submits that the appellant's appeal should be dismissed as it fails to meet the jurisdictional requirements of 28 U.S.C. § 1257(2) and Rule 16.1(b) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, George Geoghegan, Jr., member of the Bar of the Supreme Court, and counsel for the appellee, states that a true and correct copy of the aforegoing Motion to Dismiss was served upon the appellant by depositing three (3) copies of same in the United States Mails, first class postage prepaid, on this the 14 day of August, 1980, addressed to Hon. Gordon J. Dill, Jr., 1107 First Bank Building, Ashland, Kentucky 41101, Counsel for Appellant.

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